**RIAA Ex. N-102-DP - Transcripts from the proceedings of UK Copyright Tribunal – Day 1**

Wednesday, 15th November 2006

(2.00 pm)

THE CHAIRMAN: Good afternoon everybody. May I thank you very much first of all for the dramatis personae and the list of witnesses, very useful indeed. We have had a quick look at it. For those of you who have not attended before, on my left is Rear Admiral Carine and on my right is Colonel Arnold, who are the lay assessors in this Tribunal, and I am Judge Fysh and I am the Chairman of the Tribunal.

A couple of housekeeping items, which there always are on these occasions.

In no particular order, the general rule is that I would like to sit at 10.30 and rise between 4 and 5 o'clock, preferably around 4.30. It is my belief, based on experience, both as counsel and a judge, that people work a little less efficiently after about 4.30 so I am not inclined to sit for much longer after that.

Lunch, one hour, 1300 hours to 1400 hours, but again we will play it by ear -- if there is a witness hanging over or one way or another we can change that.

Thank you for your list of witnesses. I do not have a batting order yet but we can perhaps -- here it is, thank you very much.

Documents. We did not get our skeletons of argument

in time, but I am treating that as water under the bridge. It is quite serious water under the bridge as far as we are concerned because frankly we have not read them all and originally I asked for skeletons last Wednesday, then it became Friday, then it became Monday, so that we could use them on Monday, and the only one who got it in arguably within time was Mr Car.

Everybody else's skeletons of arguments came in dribs and drabs at different times, some of them delivered to my chambers up the road. Apropos please note that my judge's clerk is not my clerk of the Tribunal and what she does for me as a clerk is purely out of kindness and it is not in her terms of employment to give one finger of assistance to this Tribunal. There were some misunderstandings over that.

Also, the courts close at 4.00, certainly my court and the Immigration Tribunal up the road close at 4.00. If you want to deliver documents, it is still good to deliver them to me there.

Please no faxes over ten pages. 60 pages of fax have ruined the machine and, in addition, as my clerk points out, with the 8 per cent reduction in the civil litigation bill, we have a limit each month on the amount of paper we can use. I will not tell you what happens if we exceed that.

We may at some time ask you for another demonstration. We do not ask for a Cecil B de Mille cast of thousands. Let us play it by ear but we may want another demonstration in due course. In the meantime, as I showed you before, I have my little machine and I am becoming familiar with the art of downloading.

I mentioned the question, the possibility, of agreeing a joint history, which I could use as a crib for my judgment. Those of you who do not know how it works, unlike most foreign tribunals who have legal assistance to help the Chairman, I have absolutely none and therefore I would very much like, if not treasure, a history, if you could please agree one, the dates, the disagreements, the agreements, what happened, who agreed, who dropped out, when, all these things -- maybe some of you have sat as judges but it does take an incredible amount of time to look through all the documents to get the dates right and all that.

One thing we have noticed in the latest round of dealings, for want of a better word, is the question of the length of time of the licence.

I of course under the provisions of the Act can specify the time; often in the past, in cases that I have been in, the time has been agreed and we have all

worked to that, but of course there can be an indefinite period of time, as you know, and I just wondered if that might be a matter which you might like to think about. You remember most of the sections say something like this:

"The order may be made so as to be enforced indefinitely or for such period as the Tribunal may determine."

Speaking perhaps personally, I have always found that somewhat artificial, when people have argued vigorously about timings, save where there is truly new technology literally around the corner. Because after all, you can always make an application under one of the sections if you feel material facts have changed. I do not ask for an immediate answer to that.

The new JOL, we have got amendments to the new JOL which we have seen but we cannot find the new JOL anywhere.

MR WEISSELBERG: Bundle H.

THE CHAIRMAN: It just shows, you see, we have not had enough time to do this.

If you want to ask us any questions, I mean, this is the Tribunal, I do not want you to feel that it is an informal get together, but it perhaps does not have the formality of the august British Chancery Division

and its equivalent in Scotland, but do ask us questions, and if you think anything is going amiss please be free to tell us about it.

We are in session, then. Who is going to begin?

MR STEINTHAL: I am.

THE CHAIRMAN: You can address me sitting down.

MR STEINTHAL: Thank you.

THE CHAIRMAN: One thing I should say, if there is any timing problem at any particular time at the end of the day, you must let me know -- witnesses and so on who have to get away. Also perhaps we could collectively remember to deal with timings for the following day at the end of the previous day. Then we will all know where we are. Thank you.

MR STEINTHAL: Good afternoon. First of all, thank you for providing me with a right of audience to appear on behalf of AOL and Yahoo and RealNetworks. I would like to introduce my team. That includes Mr Salvo to my right, who --

THE CHAIRMAN: Mr Salvo I remember from the previous case.

MR STEINTHAL: The panel has given him a right of audience as well. Behind me I have Mr Larizadeh, who is a barrister in our London office and Miss Field who is a solicitor in our London office.

I think you will hear primarily from me and Mr Salvo

and Mr Larizadeh, and again I thank you for not only the right of audience but patience in connection with the obvious difficulties in scheduling by having two proceedings running at once.

Okay. First I want to talk about who we are. I think Judge Fysh's comment about downloading is an interesting segway into that.

We are the webcasters. We are not the remaining MSPs, as the alliance and BACS like to refer to us. I say that with meaning. The webcasters provide internet radio and they provide to some extent internet music television. That is what they provide in terms of what they are here to get a licence from the alliance for.

It is not semantics because the Internet music distribution business is not a monolith. It is not all one thing. It consists of three very, very, very discrete lines of business that have different issues raised by them: there are the download services, typified by iTunes and Sony Connect to a lesser extent. There are the ODS services. I am going to start using some of the initials -- in the event that you have not gotten through all the skeletons I think we all use certain initials and it is good to identify things, and being the first one out of the box I think I bear

somewhat of a burden.

THE CHAIRMAN: ODS.

MR STEINTHAL: They are not odious, they are ODS. It stands for On-Demand Streaming. The ODS subscription services, which are those that typify that part of the market, were represented in this case by Napster, meaning the new Napster service not that old file-sharing service.

THE CHAIRMAN: I remember, yes.

MR STEINTHAL: And MusicNet, which is a name that you will never hear in the market but is what we call a white label service. It is like when you go to a department store and buy a television that bears the name of the department store, you know for sure it was manufactured by some other company, typically a Japanese company, that supplies it on a white label basis. MusicNet is the white label provider for these on-demand subscription services in the UK principally for HMV and Virgin.

Then there is webcasting, which is basically as I said companies that engage in the transmission, the streaming, of music via internet radio and internet music video television.

We will come to the differences between them in more detail later. But the key thing at the outset is that the companies that settled with the alliance represented

the two fundamentally different business models of permanent downloads and on-demand streaming. And the BPI, which is the trade association for the labels, was in this case essentially the cause of their interest in the sale of digital downloads, and for no other reason.

So all the people that settled, settled on behalf of and in consideration of business models that had zero to do with webcasting.

One little footnote on Vodafone which we will come to later, one of the four MNOs which is now launching an extremely small webcasting service, no one else has any interest whatsoever, whatsoever in webcasting.

Now, regarding the mountain of written evidence and submissions that have been put before you.

THE CHAIRMAN: Mountain range.

MR STEINTHAL: You have my sympathies; there is a lot to sort through.

My goal today is to help distill for you what the overarching issues and evidence are to help you sift through that evidence and sift through the written submissions.

The good news is that the written submissions suggest that some issues really are not in dispute at all. I will identify those. Also some issues appear, even to somebody like me that has been living in this

world for quite some time, to be extremely dense. The gross revenue definition language and the issues debated back and forth on that are extremely dense.

THE CHAIRMAN: "Dense" means difficult to understand or?

MR STEINTHAL: Difficulty to understand and difficult even to identify what the issue is.

If you look at the red lines, God forbid, I would not wish that on anyone, especially the three of you, to try to figure out whose language better fits an appropriate resolution of an issue. So what I suggest to you, respectfully, is that when it comes to the dense issues, in particular gross revenue definition, that we present to you conceptual issues for resolution with the notion that the parties and counsel would then act upon your conceptual resolution and embody those resolutions in a final licence scheme, without coming back to you, with respect to the resolution of drafting issues unless we reach an impasse.

So in essence, as I get to that at the very end of my opening, I will identify the concepts that I believe to be disputed between the webcasters and the alliance on gross revenue definition issues, suggest to the panel that you resolve the conceptual issues and the specific examples that may be provided by the parties as examples

of those concepts and then leave it to us to go back through the red lines and come up with something that comports with your resolution. Otherwise I honestly do not know how you would expect, especially given the lack of staff, to go through the red lines, the dense reds lines, and figure out which is the correct language embodiment of what you would like us to do.

So, again, I will come back to that at the end.

THE CHAIRMAN: You will also indicate to us what is common ground or what you believe to be common ground?

MR STEINTHAL: Yes, absolutely.

Briefly, to introduce the webcasting issues before you. In our opening written submission we identify eight issues; in paragraph 27A through H there is a listing of the eight issues.

THE CHAIRMAN: It is quite helpful if you keep us more or less on line with your skeleton.

MR STEINTHAL: I will try to do that. Paragraph 27A through to H is a list of the issues.

Now, today I am going to address the issues in the same order as in the skeleton, except with respect to the issue of minima.

I will focus on the issue of minima immediately after discussing the headline royalty rate issues because, as I will discuss soon, minima as here proposed

by the alliance are not minima at all. They are plainly designed, and inappropriately we submit, to overtake the headline rate. Make no mistake about it, the rate issue and the minima issue are at the heart of this dispute.

Not to belittle the other issues, in particular how one defines revenue base, and not to belittle issues regarding cost of ad sales reductions and reductions for audio visual content, where the fact of a reduction is agreed, the only question is how much.

But the difference in the parties' positions on these other issues are not as stark as they are regarding rate and minima.

Initially let me address the legal framework. I, as an American lawyer, have done my best to read the precedents of the tribunal and I am happy to say that the legal framework is largely undisputed. Our position seems to be not very much at odds with any other party's position on what that framework is.

The Tribunal is guided to reach a determination based on what is "reasonable in the circumstances". It is instructed by the statute, section 129 of the CDPA, to have regard to other schemes or other licences issued to parties in similar circumstances. I underscore "similar circumstances".

THE CHAIRMAN: Yes.

MR STEINTHAL: And the Tribunal is guided also:

"To secure that there is no unreasonable discrimination between licensees under the scheme or licence to which the reference relates, on the one hand, and licensees under other schemes operated by the licensing body".

THE CHAIRMAN: 129.

MR STEINTHAL: 129, and BSkyB v PRS.

The nub of the dispute is this, although the legal framework is not disputed there is a huge gulf between the parties regarding its application to the facts.

From the very outset the webcasters have argued that they are in direct competition principally with who? Radio broadcasters for advertising spend, meaning where advertisers are going to spend their dollars. They have to choose between different media in which to spend their advertising -- I should say pounds not dollars -- and --

THE CHAIRMAN: Euros you could say.

MR STEINTHAL: When it comes to this market we, the webcasters, are competing directly with terrestrial radio and the simulcasted signals of terrestrial radio. Simulcasting -- you will hear that term a lot -- is essentially when a broadcast or terrestrial radio station puts its signal out on the internet. So you go

to XYZ.com or Virgin.com, whatever it is, and presto you will hear the same music you would be hearing in your car or at home but on the web. No differently than when you go to Yahoo.com or AOL.com or real.com and can access music on the web from their webcasting offering.

So simulcasting is technologically identical to webcasting, it is simply that the programming is comprised of the terrestrial radio's programming, delivered in that same identical fashion as webcasting.

THE CHAIRMAN: Do you pick it up by going to the relevant sites and following the instructions?

MR STEINTHAL: Sure. You can do it on the computer, and any internet-enabled device. You will hear a lot from the MNOs about how their devices can now do a lot of different things, including access streams of content.

Basically the webcasting and simulcasting are the identical technological mode of delivery to the consumer of music, one being terrestrial radio programming, the other being programming created for the Internet as its initial destination.

Now, as I mentioned, the evidence will show that the webcasters believe and do in fact compete primarily with terrestrial radio for audience. They want the people to listen to their music programming instead of the terrestrial music programming that is delivered on the

web, and they want to get the dollars or pounds or euros from advertisers in their medium of webcasting instead of putting those dollars into the traditional broadcast radio medium.

As the evidence will show, they deliver to their audience essentially the online equivalent of broadcast radio.

THE CHAIRMAN: They make the programme up though.

MR STEINTHAL: Correct. That is the difference. They are the programmer instead of the terrestrial radio station. There are some differences and costs involved. There are some differences in how the broadcast signal, putting aside simulcasting, is delivered as opposed to delivered on the web. We will talk about that later. What the evidence will show is that these distinctions do not make a difference for rate setting purposes.

Tellingly, many of these distinctions, as I said, do not exist at all with respect to simulcasting.

The alliance's chief witness, Ms Enders, has essentially conceded the close affinity as between broadcasting and simulcasting on the one hand, and webcasting.

In paragraph 217 of her second report, at page 72, she acknowledges that:

"Listening to webcasts is a supplementary experience

to mainstream radio."

For most users. Then she acknowledges at paragraph 220 and 221 of her second report:

"Commercial radio stations have started to simulcast their existing AM and FM channels on a growing number of delivery platforms including the Internet."

After she makes an error about saying that there is no advertising on simulcast delivery platforms she acknowledges, and I quoted again:

"These additional platforms are presently viewed as ancillary to the broadcast stations main AM and FM broadcasts. She goes on to say:

"Listening via these additional platforms has started to be included within a station's overall ratings by the RAJAR audience research organisation."

The point of this is that web streaming is now part of the same industry research as broadcast radio is. It is the same industry. It is viewed as such by our clients. You will hear from our clients about it and they are in direct competition for eyeballs and ears in terms of music video and radio with those broadcast brethren.

THE CHAIRMAN: For the shorthand note it is ENDERS.

Claire Enders. You will hear more about her.

MR STEINTHAL: Indeed.

In stark contrast to the consistent and we believe amply supported comparable provided by the PRSs existing and prior licensing of broadcast radio and simulcasting, under a scheme by the way that provides for a percentage of revenue royalty of between 3 and 5.25 per cent, which Miss Enders calculates averages out to 4 per cent of net advertising revenue, to be contrasted with our consistent position on that comparable from the very first pleading in this case, the alliance has followed, in the lyrics of The Beatles -- and I think we can use some music analogies now and then -- quite a long and winding road to their current trial position, and it is an extremely important long and winding road that I believe bears some laying out in today's opening.

We discussed this odyssey in our skeleton. When the webcasters filed their initial reference in June of 2005 the alliance position was that the webcasters should pay 12 per cent of an extremely broadly defined revenue base. You will see this in the 2005 JOL. They asked for the same 12 per cent that they asked from permanent download services and from on-demand streaming, the ODS services. Only after the statements of case were filed by our clients did the alliance back off from its one size fits all scheme approach.

They promulgated the 2006 JOL. They promulgated it

with their answers to our statements of case. In that document, 2006 JOL, which is what all the evidence addressed up until September 28th of this year, the alliance recognised that what it called pure or non-interactive webcasting warranted a one third reduced rate as compared to permanent downloads and on-demand streaming.

So it proposed an 8 per cent of revenue rate as against the 12 per cent rate that it was proposing for permanent downloads and on-demand streaming. Still there was no principled basis or comparable offer for that 8 per cent rate.

The alliance's winding road took another twist on the eve of trial. The alliance announced its deal with the BPI, iTunes and the MNOs, a by product of which was the new JOL, that the alliance now relies virtually to the exclusion of all else.

We will discuss shortly why the webcasting terms and conditions of the new JOL, promulgated as it was from negotiations without the presence of anyone with a meaningful interest in the webcasting business, cannot reasonably be viewed as a comparable for setting webcasting terms in this reference.

The new JOL represented a huge further position change by the alliance however. The alliance dropped

its headline rates for permanent downloads and on-demand streaming services by one third, from 12 per cent to 8 per cent. That effectively represented acquiescence in the position of the BPI, the MNOs and the MSPs engaged in permanent download distribution, that online rates should conform to offline comparables.

Why do I say that? You may recall from the initial skeletons, if you had had a chance to review them before we were about to go to trial, that this whole case was about whether the offline comparables should apply to online distribution.

That is what the mountain of Enders and Boulton and MacGregor addressed. Boulton addressed some other things on webcasting, as did Enders, but most of the fray was whether offline distribution vehicles should be used as a comparable for online distribution, and the big dividing line between these two sides of the room was we said "yes". In all the forms of distribution, all three of the business models, one thing is clear, there are analogs to offline distribution, CD sales for permanent --

THE CHAIRMAN: That is for the physical audio?

MR STEINTHAL: Right. Our colleagues on the other side contested: no, offline is a totally different business all through. You cannot use offline as a comparable.

But what does this settlement tell us about the offline position?

THE CHAIRMAN: What is the position now?

MR STEINTHAL: The position now is that the only comparable is the new JOL. What is extremely interesting is while they dispute the offline comparable of broadcast radio and simulcasting for us, the settlements they entered into represent an acknowledgment, an acquiescence in the principle that offline distribution constitutes a proper comparable here, and why do I say that?

You will recall from all the prior pleadings that what the BPI and iTunes and Sony Connect and the MNOs were saying, with respect to permanent download sales and distribution, is: look at AP1,look at the offline comparable for the sale of physical product. This is just the online distribution, the online experience of the offline old model.

And no differently than when we went from cassettes to CDs, to different format changes, the royalty rate does not change merely because the distribution vehicle or medium may change somewhat; if the experience is essentially the same for the consumer, there is no reason not to use the pre-existing framework that has been either ruled upon by the Tribunal or accepted by the parties in analogous circumstances.

THE CHAIRMAN: Just stopping there. What about the terms of these settlements? Do we know about them?

MR STEINTHAL: They have been put before you, your Honour.

THE CHAIRMAN: All of them? We had a draft, did we not?

MR CARINE: I think they are in folder H.

THE CHAIRMAN: That is what we asked about this morning.

MR STEINTHAL: But what I would like to emphasise again, because it does not strike at face value, there is nothing that says: this 8 per cent rate for permanent downloads in the new JOL is meant to be a reflection of the offline market. But if you go back and look at what everybody said, what the BPI and the permanent download services said was that the offline rate, which we believe is the comparables, 8.5 per cent of PPD. PPD is the price paid by the dealer.

So there is not a directly analogous retail number because that depends on what in fact the retail prices are going to be.

There was this big dispute between the experts on the alliance side and the parties here as to what was the retail equivalent of that 8.5 per cent of PPD rate.

One thing became clear when the dust settled with all the expert testimony: the offline equivalent of that 8.5 per cent of PPD rate, when converted to a retail rate, was 8 per cent.

So what do we have? We have a settlement for permanent downloads at 8 per cent of retail which conforms identically to what the offline rate is on a percentage of retail equivalent basis. So at the end of this long and winding road we have the alliance accepting an 8 per cent of retail rate for permanent downloads and for the on-demand streaming subscription services that everyone concerned believes to be very much akin to permanent downloads in the sense that you get to consume the music you want when you want it.

This is done on the basis of a subscription to the world's music that you can either get on a download basis to your computer or portable devices, and as long as you pay the subscription you have it; you stop paying the subscription and, voila, due to the technologists that create DRM you can no longer access it.

The concept is the same: you get the specific music you want, when you want it, track by track. You can buy it on a permanent download basis, you can rent it on a condition basis through these ODS services.

Interestingly, as I mentioned at the outset, the only parties at the table during those negotiations that led to the new JOL were parties engaged in permanent download sales and on-demand streaming subscriptions.

So, while they had no meaningful interest in

negotiating webcasting terms, the alliance plainly had a dilemma. It could have just settled on terms relating to permanent downloads and on-demand streaming and left for further negotiation or decision by this Tribunal appropriate webcasting terms.

But, no, that is not what the alliance wanted to do.

What is clear from the settlement document is that the alliance offered a deal on a package basis only.

If I can find the reference in the settlement agreements to the appropriate paragraph, I will come to that later. I do have it.

Unequivocally the alliance offered a package deal that included webcasting terms and conditions. Now the dilemma that the alliance had was that it had already conceded months before when it promulgated the 2006 JOL that webcasting did not warrant the same rate as permanent downloads or on-demand streaming services.

As I mentioned before, it previously dropped the rate for webcasting to a point that was two thirds of the permanent download on-demand streaming rate. They recognised it was because there was a material difference in the experience of the consumer in accessing webcasting as distinguished from this: get what you want when you want it, possession model reflected by permanent downloads and on-demand streaming

services.

So, out of the new JOL comes a 6.5 per cent rate for all non on-demand webcasting.

Put aside special webcasting. There is a lot of stuff in the documents about special webcasting, it is not something you should worry about. We do not know of anybody doing it right now in this market. It consists of webcasting where you can access the streams of only one artist or more than 50 per cent artist. This is a footnote issue for this Tribunal. We will deal with it later.

The question, however, is: where did the 6.5 per cent come from? How is it arrived at? We submit it is an entirely arbitrary figure.

The alliance had to lower the rate below 8 per cent, let us face it, it had already conceded that the experience for webcasting was different, materially different, and warranted a lower rate which they had put at two thirds the value in a 2006 JOL of permanent downloads and on-demand streaming.

So it had to lower the rate from 8 per cent even though nobody there was a webcaster at those negotiations otherwise it would have had zero credibility. But it has articulated not one principled basis for picking a 6.5 per cent rate. That 6.5

per cent rate is 162 per cent of the 4 per cent average rate for radio broadcasts and simulcasts.

We noted in our submission that had the alliance merely lowered the webcasting rate by the same proportion as it lowered the permanent download and on-demand streaming rates for the entities with whom they were negotiating and who were concerned about permanent downloads and on-demand streaming, guess where we would end up? We would end up with a rate of 5.33 per cent, which is two thirds, the same ratio as the alliance previously proposed. 5.33 per cent of revenue. Right smack in the zone of the 5 per cent for general webcasting to 5.5 per cent for premium webcasting proposal that the webcasters have put forward from the very beginning.

So what do we take from this long and winding road? From 12 per cent for webcasting when we filed in June 2005 to 8 per cent after the webcaster statements of case were presented, with, I believe, a very compelling written case for a lower rate to the 6.5 per cent rate for all forms of non-on-demand streaming, which was promulgated without the input of anybody in the webcasting industry.

What do we take from it? We submit that this enormous position-changing by the alliance reflects

a fundamental lack of credibility associated with the alliance and its witnesses.

Put aside the position change from the 2005 to the 2006 JOL. After the 2006 JOL was promulgated the alliance's witnesses swore up and down about how the 12 per cent permanent download on-demand streaming rate was warranted and necessary lest the entities engaged in permanent download and on-demand streaming distribution would be gravely short changing the alliance and its members.

Who can forget the mountain of publisher statements and Miss Porter's statement to that effect? And they swore up and down about how the arguments of the BPI and the MNOs and the MSPs engaged in permanent download and on-demand streaming distribution. As I mentioned before, those arguments to the effect that the online rate structure should be based on offline music distribution comparables. The Alliance's witnesses over and again said, "That is flat out wrong because", so said the alliance witnesses, "the online distribution platform is oh so different from offline distribution".

But at the end of the day the alliance now accepts -- indeed it trumpets -- that an 8 per cent of retail headline rate is quite reasonable.

And both its expert and Mr Boulton agree, as

I mentioned before, that that 8 per cent rate is exactly the same equivalent as the offline retail rate for physical CDs.

It is no wonder under the circumstances that the alliance has withdrawn all of its lay witness statements for this case. They would be exposed for a wholesale lack of credibility.

So at the end of the long and winding road the alliance was left with a decidedly simplistic presentation to make to this panel. Namely, that the new JOL should be accepted as a comparable for itself.

Let us turn to whether that is a supportable proposition. It fundamentally is not. We spend much time in the skeleton explaining why not both as a matter of fact and law.

THE CHAIRMAN: Roughly where is that?

MR STEINTHAL: It starts with the legal section. We refer to it in a background section, with a whole discussion of the eve of trial settlement agreements, then the legal standard and the summary of the webcasters' case.

Basically up through page 13 is directed principally at the new settlements as an alleged comparable. Then we address that in more detail in section sub (i) of II which starts at page 20 and goes to page 34.

THE CHAIRMAN: Yes.

MR STEINTHAL: I want to talk first of all about the facts that will be adduced, or will not be adduced as the case may be, with respect to what happened with those settlements and why that reality reflects that there is no basis for inferring reasonable webcasting terms and conditions from the settlements upon which the alliance relies.

What is the premise of their argument? The premise of the argument, and I think we have all heard it before, is that the terms advanced as reasonable were the subject of give and take, the subject of arm's length negotiation. Thus, having survived the crucible of such give and take, the terms should be viewed as reasonable.

That is the general proposition. It is in the specifics that it falls down. Over and again the alliance refers to so-called extensive "negotiations". Paragraph 1.9.1, paragraph 5.8 of the Alliance's skeleton, in which the parties assertedly:

"... gave ground on the rates... "

And other terms, including specifically the minima.

Again, paragraph 5.5 of the Alliance's skeleton. These are direct quotes. Here is the fallacy of the argument. The alliance is putting forth the settlement agreements with the settling parties as evidence of the

reasonableness of the webcasting terms and conditions contained in the new JOL, not the reasonableness of the permanent download rates or the on-demand streaming rates which are outside the scope of this reference as of now.

Yet there is not a shred of evidence, not one iota of evidence, that the webcasting terms and conditions in the new JOL in fact were the subject of any "extensive negotiations" or any "giving of ground" that the alliance repeatedly invoked.

Indeed, there are abundant indications to the very contrary; plainly, no entity with a meaningful interest in webcasting was at the table.

This is where the very different business models that I talked about at the beginning as between the permanent download and on-demand streaming subscription services on the one hand and webcasting on the other are critical to acknowledge.

Webcasting, especially when offered as one aspect of a portal's business, and that is what we have here in Yahoo, AOL and Real, is a fundamentally different business proposition in permanent download and on-demand streaming services.

Permanent download and on-demand streaming subscriptions are almost exclusively a pay business.

You pay for a download. You pay for a subscription. It is not an advertiser-supported business. Not one of the entities that engaged in the negotiations leading to the new JOL were engaged in advertiser-supported webcasting. Not one. The only entity that had the remotest connection to the concept of webcasting was Vodafone, who was about to launch a pay subscription service which it is clear was nothing, de minimis, compared to its core business.

Even the alliance's own experts concede that the online music distribution business is dominated by the pay-for-music model, particularly in relation to downloads as popularised by iTunes.

Indeed, if you ask a hundred people about legitimate online music distribution, they immediately think of what? They think of iTunes. They think of what His Honour Judge Fysh said at the beginning: familiarising themselves with what? Downloading.

That is what people think of. They think of the old Napster and file-sharing, they think of the new models where you buy permanent downloads from iTunes and you put them on a player and you sort your music and you listen to it when you want, and they think about all the advertising, the new Napster service and HMV and Virgin.

I was listening last night when I was preparing my

opening and there were all these advertisements for Napster and for subscription on-demand streaming and conditional download services.

But if you ask those hundred people what webcasting is they will look at you curiously and ask you: what is that? It is a totally different business. It is online radio. It has nothing to do with people's concept of online music distribution and it is fundamentally different in terms of how it generates revenues, and what it is as a consumer experience from the businesses that are at the table.

THE CHAIRMAN: What are the different consumers then? Tell me about that.

MR STEINTHAL: The consumer, when it buys a download or when it engages in a subscription to get music on demand, is basically saying: I am going to plonk down dollars, it is worth it for me to own this piece of music or have access to music like -- I do not know if you have HBO here but you may have the same version of it. If people decide they want to spend £15 a month for accessing on-demand movies, or a slate of programming that they cannot otherwise get, then that is a decision you make: I want this music, I am willing to pay X dollars, X pounds a month for it, either to buy it or to have it on-demand.

That is a fundamentally different consumer experience than turning on the radio, or turning on your computer and saying: you know what, I think I will listen to some music now. And instead of turning on the button to hear terrestrial radio you turn on AOL.com or Yahoo! LAUNCHcast.com and you have the music streamed to you that way. It is a passive experience.

In the jargon, the difference is the difference between push and pull. It is a very key difference. It underscores the whole value proposition in the music industry. Radio is push. Webcasting is push. The consumer does not know the next song. The consumer is there for a combination of reasons, to get music they do not know about yet perhaps, or because they are lazy, or because they do not want to pay for something at that moment. They do not want to go to the trouble of buying the latest CD, or spending £15 a month for the Napster or HMV or Virgin service. They are content to have a passive listening experience where someone else pushes music to them. So it is the push versus pull. The economics are totally different.

Push, advertiser supported, some modest degree of subscription for push services but very little. The evidence will be that what people believe is that radio historically is free, therefore webcasting is going to

have a very hard time generating consistent demand on a pay basis for ad-supported radio where you, the consumer, do not pull the music.

THE CHAIRMAN: Not always free in this country.

MR STEINTHAL: That is what we are finding now in this industry, that webcasting is having trouble trying to monetise on a subscription basis. Can it do so to some degree? Yes, Realnetworks has a subscription service, but you will hear from RealNetworks that there is very little take up. Because people generally, if they want webcasting, want it for free.

THE CHAIRMAN: Are we going to hear anything from the sort of sociological point of view or demographic point of view what the subscribers to your client's product are like, as opposed to the thousands we see walking the streets with products like Ipods?

MR STEINTHAL: I think what you will hear about is in the context of the bundled services, where people buy -- principally like the BT-Yahoo service, where you pay your money for internet access and connectivity and included within the bundle is a variety of services, including webcasting.

One of the things you will hear, and I will come to this very importantly in the unbundling part of the revenue issues, is that an extremely small number of

people who are buying access to the internet ever go and use the webcasting service that is bundled within it. So I think that shows a little bit about consumer behaviour. People are using online connectivity for portable devices, not for webcasting, not to have stuff pushed to them, but to pull. To pull to them music on demand.

THE CHAIRMAN: It is not the only thing they will be interested in.

MR STEINTHAL: No, they are interested in tons of things not related to music.

The point is two things, one is that in the bundled environment most people are buying connectivity. They are buying fast access to the internet to do whatever they want on the internet. In the small sliver of the reason why people subscribe to these bundled services to use it for music purposes, it is predominantly for pull purposes. It is predominantly to get the download, whether illegally frankly, if they use high-speed internet access to use file sharing services, like Kazaa, and the services that followed in the old Napster, or they use it for purposes of managing their online music and then listening on demand to the music they own or that they rent from these other services.

I think you will hear that in the evidence. I think

it is relevant principally to this bundled service scenario and why you have to be very cautious in looking at the revenues that somebody pays for a bundle in which music is a tiny portion. It is very perilous to try to ascribe a specific value to the music component when the individual elements of the bundle are not separately priced. We will come back to that.

Setting the stage, just before the trial was about to begin, on 28th September we learn -- pretty much at the same time that His Honour Judge Fysh learned, I think he may have learned before I did -- that there were negotiations between iTunes, BPI and the MNOs and the alliance, representing as I said, permanent download services; the BPI, a trade association whose members are predominantly concerned only with the sale of sound recordings, and the MNOs, whose music activities were virtually exclusively in connection with permanent downloads.

This is all in paragraphs 87 to 93 of our skeleton.

The alliance readily concedes that the terms of the new JOL, including the webcasting terms and conditions, were offered on a package basis as I mentioned. Here is the citation for that, paragraph 11.1(d)(i) of the settlement agreements. It is in volume H. I am informed it is tabs 1, 6 and 8.

THE CHAIRMAN: Shall we try it out and have a look at it?

MR STEINTHAL: You can. I am going to quote the one passage that is relevant, if we can avoid having to go through finding the documents. I am not going to spend a lot of time with it. If you would like to have it in front of you I will take a break for a minute and have you pull it out.

Let us take the Apple settlement, which is tab 1, H1.

THE CHAIRMAN: Let us try it out. Where?

MR STEINTHAL: This will be paragraph 11.1(d). Sorry, it is 12.1. Some of the agreements have different paragraph numbering.

THE CHAIRMAN: I have bundle H, I am going to tab 1.

MR STEINTHAL: Tab 1 and go to paragraph 12.

MR CARINE: Page 29.

MR STEINTHAL: Page 9. It may be that there are multiple copies.

MR CARINE: Page 9, I have it.

MR STEINTHAL: If you look at that it states in paragraph (d)(i):

"The settlement agreement, including the scheme, is a package deal."

What does a package deal mean? Package deal means very simply you cannot have the permanent download and

on-demand streaming terms that you had negotiated that are of meaning to you because that is the business you operate unless you accept the new JOL as a whole, including its webcasting terms and conditions.

The alliance must concede as well that notwithstanding that the settling parties -- this is sub (ii) -- notwithstanding that the settling parties acceptance of the new JOL as a whole was:

"... not to be treated as any acceptance that any individual element of the settlement agreement, including the new JOL, viewed in isolation is fair and reasonable."

Again, unfortunately the numbers change from some of these settlements. This is now (e) in the document we are looking at in tab 1:

"Notwithstanding clause 12.1(d) above, the execution of the settlement agreement shall not be treated as any acceptance by any of the MCPS, PRS, the Academy or the settling applicants that any individual element of the settlement agreement, including the scheme, viewed in isolation, fair and reasonable."

This deal is offered as a package even though the companies at the table are doing two lines of business that they care about, they were only offered the deal with a package that included terms concerning webcasting

that were not -- that were simply not relevant to their current lines of business.

Also undermining the alliance's position is the fact that even the document itself makes clear that you are not supposed to take an individual term in isolation, or set of terms, from the new JOL in isolation and say that they are fair and reasonable.

Yet that is exactly what they are doing here and that is why we are here.

The only comparable they are offering is the JOL for itself, saying that the webcasting terms and conditions are fair and reasonable. They have routed it out of the new JOL and put before you in isolation the webcasting terms and conditions as being reasonable.

Just to make matters worse, each of the settlement agreements has what we refer to in our skeleton as a silencer clause. I think the MNOs refer to it in their skeleton as a gag clause.

THE CHAIRMAN: Slightly more emotive.

MR STEINTHAL: Yes.

Each of these conclusions provides that no settlement party may assist any applicant to continue to challenge the JOL. In the document you are looking at page 9, 12.1(b):

"Save for clause 9.2 above, no settling applicant

shall refer nor assist, save and to the extent required by any order of the copyright tribunal or a court of competent jurisdiction or by law so to do a third party in referring nor intervene in any reference made by a third party preferring the scheme."

Hence our need to issue summonses to a few local representatives of the settling parties from which we expect to demonstrate, first, that the new JOL's webcasting terms and conditions were not a meaningful issue for them in determining to settle with the alliance.

THE CHAIRMAN: It made no difference to them?

MR STEINTHAL: Right. Second, that instead they were concerned either exclusively, maybe no difference -- it is either no difference or a tiny difference, but certainly their concerns at that bargaining table were either exclusively or predominantly associated with permanent downloads and on-demand streaming because that is the only business they were in.

Thirdly, that the new JOL was offered only as a package inclusive of webcasting terms that were not the subject of any meaningful give and take. Let us remember, the alliance has put forward over and again in their papers: why should you look at the new JOL's webcasting terms as reasonable? Because the terms of

new JOL were the subject of extensive negotiations, extensive give and take, they survived the crucible of negotiation with sophisticated parties.

If there is no evidence that the webcasting terms and conditions were subjected to that crucible, that they were of any meaning to the settling parties relevant to the businesses they were in, how in the world can one draw an inference that those webcasting terms and conditions, improperly routed from what was supposedly not to be taken out in isolation, how can we conclude that those webcasting terms and conditions taken in isolation were reasonable?

We suggest to the panel two things: as a matter of fact that is inappropriate, there is no basis to conclude that there was any give and take associated with the webcasting terms and conditions, or that those webcasting terms and conditions were subjected to any crucible or any determination meaningfully by any of the settling parties.

You will hear hopefully from Mr Taylor of the BPI, Mr Lee from the MNOs, from T-Mobile, and from Mr Mooradian of MusicNet on this score. I say "hopefully" because we have summonsed them, we cannot really reach representatives of other settling parties that are not domiciled here in London or the UK, we

think that hearing from three of the companies will be exemplary of all the companies that were at the table.

I say "hopefully" because we have had some back and forth with counsel for the alliance about their objections to our eliciting certain of this testimony from the witnesses, we will worry about later. It is our intention to call them, they are on the witness schedule.

You will also hear expert testimony from Mr Boulton that under all of these circumstances the settlement agreements relied upon by the alliance do not form from an economic perspective a viable comparable for the webcasting terms and conditions of the new JOL. He will explain how the alliance's theory might hold water, if at all, only as against entities of the same vested business interests as the settling parties.

In other words, the settlements might be comparables were another entity to challenge the permanent download or on-demand streaming terms and conditions of the new JOL, which clearly were subject to the crucible.

But given that none of the settling parties had any meaningful interest in webcasting, coupled with the lack of any evidence whatsoever that the webcasting terms and conditions were the subject of any give and take, there is simply no economic basis upon which to draw

an inference of reasonableness regarding the webcasting terms and conditions sought by the alliance as part of the new JOL package.

One more thing on this issue. I devote a lot of time to it because, let us face it, it is their case. Their sole comparable.

The alliance asserts and I quote the answer, paragraph 3.3:

"Almost all of the major participants in the relevant market", except at the new JOL, "almost all of the major participants in the relevant market" disingenuous at best.

As I mentioned at the outset, this is not a homogenous online music market. None of the parties at the table were engaged in the webcasting industry. Only by sleight of hand, by suggesting that the online music market is an amorphous, homogenous market could you try to get away with a statement like that. But the evidence will show that webcasting is just plain different and therefore you cannot draw the inference that the alliance would suggest that you draw.

To the contrary, instead of drawing an inference from settlement negotiations in which not one webcaster participated, the testimony you will hear from the three webcasters that are still in this case, AOL, Real and

Yahoo, but also from two other webcasters, Pandora and MusicChoice.

Mr Brown from Pandora, and Mr Johnstone from MusicChoice.

THE CHAIRMAN: No, Brown from MusicChoice.

MR STEINTHAL: The other way round I think, Paul Brown from Pandora and Mr Johnstone from MusicChoice.

THE CHAIRMAN: It is the wrong way round on the song sheet. Very well, not to worry, we will hear them all the same.

MR STEINTHAL: The point is simply that you will hear from the existing dominant players in webcasting, which are the three entities in this case, and two other companies that are wishing to be webcasting in the UK, that contrary to this notion of inference that the alliance suggest, the actuality of the webcasting terms and conditions is a horror for webcasters.

THE CHAIRMAN: The actualities?

MR STEINTHAL: In other words, the application of the actual terms and conditions of webcasting, including both the headline rate and more specifically the penal aspects of the minima that are being proposed by the alliance, change the economics of this business drastically. So much so that a company like Pandora, which has a successful operation outside of the UK, as Mr Brown says, probably will not launch in the UK if the terms

and conditions of the current webcasting portion of the JOL were applied.

You will hear specifically with numbers -- I do not want to go into the numbers, as much as I can I would like to stay on the public record. When I get to one thing later on minima I am going to have to ask people who are not class 2 recipients to leave. For the most part I will try to steer clear of actual data --

THE CHAIRMAN: Yes, please, that is how I want it done. I do not want huge drifts of people coming in and out of the room all the time.

MR STEINTHAL: Just a final word about application of the prior precedents to the asserted use of the settlement agreements as a comparable for the new JOL's webcasting terms and conditions.

The Tribunal is to have regard to "other licences" to parties "in similar circumstances".

THE CHAIRMAN: Yes.

MR STEINTHAL: The gist of the factual presentation is that the parties that settled on terms that included the new JOL were not in similar circumstances to the webcasters.

They have very different business models that motivated their decisions to the new JOL -- so the new JOL might be deemed, as I say, a comparable for permanent download and on-demand streaming businesses,

but it is not so for a business that is not meaningful to the settling parties.

I note also that where there are asserted benchmarks which are not entirely comparable, the Tribunal may follow the course described in the BPI v MCPS case and take the asserted comparables into account "but scale them down because of the differences".

At best, you would take the 6.5 per cent and scale it down because of the differences, and as I will get to, if it is used as a comparable at all it should be scaled down to the 5 and 5.5 per cent.

THE CHAIRMAN: That is your case?

MR STEINTHAL: That is our case. Our case is you should not look to that as a comparable at all. Let me be clear, our comparable comes from this licensing body's existing and historic licensing of broadcast radio and simulcasting, which is a direct comparable to us. That is the business we are in. We are the online equivalent. We do not have to go near the new JOL as a comparable. What I am saying is that even if you were minded to look at the new JOL as a comparable, I would suggest to you that you do not even look at it; given the factual circumstances where there is not one webcaster there in the whole history of the long and winding road down to the new JOL, it is not

a comparable.

How can anything be a comparable for itself I wonder? I have never seen a case like that. They are proposing that something that they did on September 28th is now going to be a comparable for itself. Unheard of.

Beyond that, for the reasons that I have just laid out in great detail, and the evidence will show, it is just not a proper comparable because webcasters were not involved in those circumstances and webcasters are not similarly situated with respect to the interests of on-demand streaming and conditional download and permanent download services. To the contrary, broadcast radio, simulcasting, is the right comparable and we are going to get to that in just a moment.

We can even get to it right now, because on the other side of the coin the unequivocal dictate is that there be no unreasonable discrimination between the licensees under the scheme in question and licensees under other schemes operated by the alliance. That is very clear from CDPA section 129 and from the BSkyB case.

Here it would be plainly discriminatory to webcasters as against their broadcaster simulcaster competitors to have the webcasters paying at a headline rate that is 162 per cent for the average rate under the

CRCA licences.

What does the alliance say about that? They seek to argue that the webcasters are different. But the record will show that that is not so in all meaningful respects. To be clear, we are not saying that the webcasters' and broadcasters' simulcasters are identical. But they surely provide a product that is the online version of what webcasting does of broadcast radio and music television.

As noted before, Ms Enders herself acknowledged that listening to webcasts is a supplementary experience to mainstream radio. Even in the alliance skeleton, paragraph 8.2.4, they concede that the pure webcasting experience, the non-interactive webcasting experience, 8.2.4 of their skeleton is --

THE CHAIRMAN: Just a minute, hold on. Can I read that.

MR STEINTHAL: Where they concede that the experience of non-interactive pure webcasting is experience "in the same way as if the user turned on the radio". Their own words. We are talking about functionally an equivalent experience. The evidence from the witnesses from Yahoo and AOL and Real show that from a consumer perspective webcasting offers a pre-programmed listener experience on the basis of music genres or artists, the key being that the playlists are selected by the webcaster. It is

a push.

Webcasting neither offers the consumer the ability to hear tracks of their own choosing or on demand or to make copies or downloads of music. Just playlists preselected by the webcaster, the quintessential push experience versus the quintessential pull on the other side.

Most importantly as I have said, and the testimony will be, from a competition perspective the eyeballs and the earballs we are seeking are those same ones that broadcast radio and simulcasters are seeking.

THE CHAIRMAN: Mr Steinthal, I am puzzled as to why somebody should want this service. I know we are here -- this is not an imaginary service you are entertaining us with -- but if there is a galaxy of radio stations of all kinds broadcasting every conceivable kind of music --

MR STEINTHAL: Here is the answer, and I think this is true of a lot of different industries, but it is a multi-billion dollar market, the radio advertising market. It is huge. Advertisers spend fortunes getting messages through to people.

THE CHAIRMAN: I have begun to listen to it since I have taken this job.

MR STEINTHAL: What Yahoo and AOL and Real will tell you is they think they can provide a somewhat better listening

experience than terrestrial radio. They are competing for the same ad dollars, but if they can get the word out, if they can get a lot of people to come to this Tribunal and hear what it is all about, maybe more people will listen to webcasting.

But the answer to your question is that it is a huge market, it is a huge ad spend. Billions and billions of pounds per year.

So what Yahoo and AOL and Real are saying is: our programmers, our computer algorithms, some of the features we can offer, because of the technology of simulcasting as well as webcasting, you can do some things a little differently. It does not change the overall experience. So the alliance takes the position: oh you can skip a song, a huge difference. Well, it is not a huge difference, you can change stations on your preset dial. The alliance says: oh, you can have consumer influence, it totally changes the proposition. Again, call-in radio and requests are a fundamental part of the playlist generation on terrestrial radio. It is just that we can do some of those things a little bit better.

We cannot do some things as well as terrestrial radio and we are not, as I said, arguing that we are identical to terrestrial radio, but the experience is

fundamentally the same. It is the push experience and we think if people learn about who we are and what we do, we can crack that advertising budget and get more dollars from it.

That is the dream. That is why people do it. That is why AOL and Yahoo and Real are doing it.

Coming back to the comparable, the differences that the alliance puts forth are not meaningful differences in terms of looking at the terrestrial radio simulcaster rate as a comparable. Do some differences exist? Of course. There are viable differences, if you will, between the broadcast radio delivery and the simulcasted delivery of the same station yet they are both subject to the same CRCA scheme. So the mere fact there are some differences does not take you away from the fact that the right comparable is the radio comparable.

As far as the alleged lower costs that the alliance talks about as between webcasting on the one hand and terrestrial radio, two things: they are either factually wrong or overstated in certain respects, or they are different in kind.

So we have bandwidth cost for radio. We do not have licence cost in terms of regulatory licences, but unlike terrestrial radio every stream you make costs you money because you have to pay for bandwidth. There are cost

differences. But at the end of the day the notion that this is a cheap business to be in is totally belied by the evidence. The evidence from Yahoo, AOL and Real will show you that it is not a cheap business to be in.

Indeed Yahoo's costs, as you will hear, are fundamentally no different than a large market radio station. I am not going to get into the specific numbers, but again it is not a difference that means anything for purposes of your rate-setting purposes and requirements.

THE CHAIRMAN: There is going to be a dispute presumably between this issue we are talking about, what you can do and what you cannot do?

MR STEINTHAL: There is a dispute to some degree. There should not be, because ultimately we could show you what we do and you could make up your mind as to what it is and what it is not.

THE CHAIRMAN: Put this on your shopping list then, Mr Steinthal. When we have -- I thought we would be coming to this sooner or later -- a resumed demonstration, perhaps I speak for my colleagues, we would like to try this out and listen to some of your famous simulcast or ordinary webcasting.

MR STEINTHAL: We would love to demonstrate it. Mr Larizadeh is just waiting to do it.

MR CARINE: I would particularly welcome it because I missed the earlier demonstration because I was in Syria.

MR STEINTHAL: We would like to do that. We may, in order to demonstrate certain specific issues, be up and running with certain witnesses so they can show you how their service works, and that may be the best way to do it if the panel would like us to do it that way, rather than a separate date, as long as we do not take up lot of time doing it. We could just have the witnesses themselves walk you through what they do and answer any questions that you have about their service, rather than having the lawyers answer the questions. We are happy to do it that way.

THE CHAIRMAN: Speaking for myself, I would be very happy to do it without lawyers.

MR CARINE: I was in Syria on business so I missed the earlier demonstration.

THE CHAIRMAN: We could maybe even do it ourselves.

MR STEINTHAL: Yes. Nothing would make our clients happier than to get you addicted to webcasting.

THE CHAIRMAN: Is it free?

MR STEINTHAL: It is free.

MR CARINE: I have to say I would break it.

MR STEINTHAL: Just briefly, some of the other differences that are posited by the alliance in their effort to

disincline you to apply the broadcast radio simulcaster comparable.

They talk about the second right issue, as I call it. They claim that there is a separate right, the server copy being necessary to facilitate the stream of music to the listener through webcasting.

They say this is a multiplicity of rights not really existing in the broadcast environment.

That is just both factually and legally wrong.

First of all, the evidence will be that broadcast radio does not spin records any more. They burn the CDs onto a server and they point. You do not have people sitting in a radio station spinning records or putting CDs in cartridges. It is all on a server. They are already doing precisely the same copying to facilitate a performance as what webcasters do.

A simulcaster, by definition, is doing the same thing, and they are covered by the CRCA agreement that we talk about. Mr Porter in his withdrawn testimony acknowledges that the broadcasters are doing that, and he says, rather timidly: we intend to seek more money for that activity. But they have not done it.

So what we have is essentially the same activity, the second right is not a second right at all. It is the same activity that broadcast radio and certainly

simulcasters are already doing, and if you go back to the case BPI v MCPS, from which the AP1 ruling came, precisely the same argument had been made back then and the Tribunal correctly held at that point that -- we have to look at the value of what is being delivered, not whether there is more than one right involved in the distribution of the product, and the value is the value of the delivery of the music.

THE CHAIRMAN: How do they define the second right?

MR STEINTHAL: It is the mechanical right. In other words, radio is quintessentially a performance medium as is webcasting. You cannot copy. The consumer does not get the copy. So unlike permanent downloads and conditional downloads, where the mechanical right is the dominant right in what is being delivered to the consumer, with radio the dominant right is the performance right because you do not get a copy.

The fact that you make a copy to facilitate the delivery is incidental. It adds no value to the consumer. It is just incidental to get from here to there.

All the point is here is that the alliance is arguing: oh, online distribution, second right, more value, we got to be paid more. The answer to that is: no, as a fact actual matter, because the entities under

the CRCA agreement are doing the identical thing, and as a legal matter that argument has been rejected already.

THE CHAIRMAN: Are we going near the public performance then of a webcast? Rather like -- you may not be aware of section 72 of the Copyright Act, but there is an issue sometimes about the playing in public of a broadcast, which is a separate right.

MR STEINTHAL: No differently; the JOL does not confer a right for that retransmission, if you will. So that just as if I am a store owner and I play a radio for the patrons, that might be deemed a public performance subject to a separate alliance right to licence that store.

No differently if the store owner is using internet radio on the speakers instead of broadcast radio, neither is covered by the new JOL.

THE CHAIRMAN: Is that within the terms of this reference?

MR STEINTHAL: It is not. It is an exclusion from the new JOL, precisely because the alliance wishes to separately licence those further transmissions.

THE CHAIRMAN: That is the next reference. I like to know what is coming up.

MR STEINTHAL: We have no quarrel with that, not today.

The other and probably the most significant difference that the alliance points to as between

webcasting and broadcast radio and simulcasting is the current reality that webcasters tend to use more music per hour than does commercial radio. It is between 20 and 25 per cent right now. Basically just in crass terms you probably have 11 or 12 songs per hour on broadcast radio, versus 15 or 14 or so on webcasting, in part because we do not have the advertiser volume yet that broadcast radio has.

As a practical matter, the CRCA precedents upon which we rely would suggest that it does not matter. Why do I say that?

The CRCA agreement provides that as long as you have more than 15 per cent music content, as a radio broadcaster you pay the same rate whether you have 50, 70, 90 per cent music content. It does not differentiate.

What we have done in part to try to make things uniform and easy in application and in part to deal with the argument that we expected, that there is more currently in terms of music content on webcasting and broadcast radio, is propose a 5 per cent rate instead of the average 4 per cent rate under the CRCA agreement, so that in essence even if you uplift on the basis of greater music content, you would uplift from the average 4 per cent rate for broadcast radio to 5 per cent at

a max and you would have it covered.

Yes, we concede the difference here. No, we do not believe it has any legal meaning. Just look at the CRCA agreement, and even if you did find factually it wads a compelling reason to make an adjustment we have already done it for you by proposing the 5 per cent rate.

My colleagues tell me if you want the CRCA agreement as a cite, it is in tab E3 at pages 755 to 773.

THE CHAIRMAN: Thank you very much.

MR STEINTHAL: Finally, there is the issue of greater choice of stations. The alliance points out that you can get a choice of 100 or more stations on certain webcast outlets, they are more narrowly defined genres, so if you are a fan of celtic music you can get a celtic radio station that might be harder to get on terrestrial radio, and they point to some of the features I talked about before, skipping from one song to the next.

THE CHAIRMAN: You mean, for example to take your celtic point, you could webcast, could you, here in London something like an Irish radio station in the west of Ireland?

MR STEINTHAL: You could do one of two things. You could broadcast that Irish radio station --

THE CHAIRMAN: Which you could not get here.

MR STEINTHAL: But you could online. In other words, it is

not necessarily what we are doing. You could go to -- if it was Celtic.com, they could have their own website. Many, many radio stations do. So you could go to Celtic.com, not through AOL or Yahoo or Real, or perhaps Real does provide you with links to a lot of these terrestrial simulcasters.

THE CHAIRMAN: What you are saying is you could do Radio Celtic, and Radio Celtic would go direct through the --

MR STEINTHAL: If you wanted the hometown feel of that Irish celtic station you could go to Celtic.com or you could pick up that celtic terrestrial station on Realpass or Radiopass if it is a RealNetworks offering, or you could go to AOL Radio or Yahoo radio launch cast, and they would have in their genre classification of stations, they would have some regional music stations.

MR CARINE: When you are outside of the range of the radio station itself.

MR STEINTHAL: Either one, either outside the range -- that is one --

THE CHAIRMAN: They would not be the same though, would they? You would put advertising on yours.

MR STEINTHAL: Two things on that. One is, I want to be very clear what the differences are and are not. The terrestrial radio station in the town -- your first

question -- pays under the CRCA agreement. They are not us. Even if RealNetworks provides you a link as part of its panoply of offerings, RealNetworks does not pay under the new JOL for that because all we are doing is flowing traffic to Celtic.com.

THE CHAIRMAN: You are funnelling, yes.

MR STEINTHAL: In that respect they are still under the CRCA agreement and you get the identical experience you would have had for terrestrial radio if you were in the town; without any geographic limitation whatsoever you can access it around the world. So the notion that there is this huge difference between webcasting and simulcasting is nonsense. Simulcasts are available everywhere around the world, just by going to Celtic.com, in our example, just as the "created for the Internet-only" channels are available everywhere around the world.

The difference is that the stations programmed by AOL or Yahoo Radio would be programmed by their programmers instead of the guy who runs the station up in Ireland. Their programmers are going to pick what they feel consumers are going to want, which may be somewhat different than what the guy up in Ireland thinks consumers up in Ireland want.

But it is the same experience in the sense that it is a push experience to the consumer. If you want the

local flavour, if you want to hear the traffic reports, you want to hear what is going on with the disc jockey in that town in Ireland, you can go there. If you prefer not to have that disc jockey and prefer to get the stream of celtic music from the Internet-only station you go there.

THE CHAIRMAN: The same genre of music.

MR STEINTHAL: Exactly, and the same concept of push rather than pull.

THE CHAIRMAN: So it is different to that extent.

MR STEINTHAL: It is different in that respect but it is not a difference that means anything when it comes to your responsibility.

Because the value of the music is no different. It is being delivered in two different kinds of stations but that difference does not compel a different outcome than the CRCA agreement.

The RealNetworks example is a great example. You go to RealNetworks and you will have side by side that celtic station from Ireland and their celtic station.

Why in the world should Real be paying multiples more for a licence, and that is what would happen when the minima kick in, and I am going to spend a lot of time on minima. Apart from the 162 per cent rate that they are proposing as a headline rate, there are no

minima under the CRCA agreement and there are punitive minima under the new JOL.

The end result is, as you will see later, payments six or seven times higher in some cases, or two or three times higher in others, if the minima kick in.

The bottom line is: that is discrimination. Going back to the law, it is totally discriminatory without justification for the station that is being linked to on Real.com from Ireland to be paying at the average 4 per cent rate while side by side Real's own internet-only station with the same genre of music, perhaps with a few more songs per hour which is accommodated for in our adjustment, at the 5 per cent rate. There is simply no justification for the discrimination that the alliance is proposing.

To move on. Far and away we believe the best comparable obviously is the CRCA broadcast agreement and that the alleged differences are, as I said before, and as the jargon goes, distinctions without a difference.

Yes, there are distinctions but they should be of no difference to you in exercising your responsibilities to set a rate.

I mentioned this and now we get to talk about it. Minima.

Before getting to the vitriol, and there is a lot of

vitriol about minima in our skeleton --

THE CHAIRMAN: Tell us what you mean by minima, first of all.

MR STEINTHAL: A minimum fee, so that notwithstanding what the 5 per cent rate would generate, or what the 6.5 rate would generate, you would have to pay a minimum fee irrespective of what your revenues are and what that headline royalty would be.

The alliance's position in the new JOL is interesting. There is this whole thing about categories, again I do not want to get bogged down about this, but there is pure webcasting, there is premium and interactive webcasting, and there is special webcasting according to the alliance's world. In our world we prefer to call them general webcasts and premium webcasts.

THE CHAIRMAN: They are all set out in part 8 of their skeleton, are they?

MR STEINTHAL: I want to try to simplify things as much as I can for the panel.

First of all, these differences in terminology under the new JOL are irrelevant as to headline rate. They are only relevant as to minima.

Again, put aside the special webcasting category. If you have a station that is more than 50 per cent

dominated by one artist or one band, and as I talk about general webcasting in a minute you will hear why that is nothing to worry about.

Put that aside for the moment.

We can avoid differences about what is the difference between pure webcasting and general webcasting. Where do you draw the line between pure or premium and interactive as the alliance would draw it, or we would draw it between general and premium?

You can avoid line drawing if there is one unified rate and if there is no differentiation for minima purposes between these sides of webcasting services.

We would submit to you, and we do in our skeleton, we explain where we would draw the line, and in a nutshell let me explain this.

Webcasting started in the United States. You can blame us for this bad product. We started it. Under the US law, and we are taken to task for referring you to US law. We are not referring you to US law for anything other than the recognition of custom and practice in this industry which has been carried into the UK. We are not saying: go set a rate based on rates in the United States. We are saying this industry grew out of services that developed in the United States and because it is --

THE CHAIRMAN: Do not worry about that, it is not a mortal sin to refer to US law in this country. Some counsel do it.

MR STEINTHAL: Anyway, for reasons relating to how much you pay the sound recording honours for performances of digital music, in the US we have a world in which, believe it or not, you do not pay sound recording owners for terrestrial radio. The feeling in the US is that the record companies get such a boost from the promotional value of radio that there is no performance right in sound recordings.

But because of digital transmission and their higher quality, or whatever the reason was, Congress in its infinite wisdom granted to the record companies in the late 1990s a performance right in sound recordings, but at the same time they said "We do not want to have a situation where the labels can charge whatever they wish, so we are going to have a compulsorily licence that basically exists so that if the record companies and the services do not reach an agreement on what the right value of webcasting is, the CRB, the Corporate Royalty Board, or the Corporate Arbitration Royalty Panel would make that determination".

But in order to comply with the statutory licence, what Congress did is it said: "Look, this compulsory

licence exists only for radio-like things. If it is on-demand, if it is downloads labels charge whatever they want. In order to be compliant with the statutory licence you have to follow all these limitations: you cannot have more than three songs from the same album in a three hour period; you cannot have more than four songs from the same artist in a three hour period". Hence the special webcasting category is irrelevant to a DMCA limitation, because by definition they have more than four songs from the same artist in a three-hour period.

There is a variety of these limitations in the DMCA. And while we are being chastised for making reference to it, it is interesting that the pure webcasting definition in the very new JOL literally imports from the DMCA most of the very same programming limitations that are associated with that seminal set of limitations coming from the DMC.

The important point is that it is a known commodity. It is what webcasting grew out of and it is those channels and those kinds of programming that have been imported here in the UK. So it makes sense if we are going to draw lines between interactive premium types of webcasts and non-interactive general webcasts we should draw the line as it was initially drawn.

That is why in our Statement of Case and in the red line what we have said is: if there is going to be a distinction, let us use the distinction from which this all was born.

The alliance makes this argument that the Yahoo service is interactive and should be deemed premium. They pick up one sentence out of the statute which defines what is interactive and what is not interactive.

I do not want to spend a lot of time today on that issue.

THE CHAIRMAN: The Yahoo service is interactive?

MR STEINTHAL: No, it is not. According to Yahoo it is not. According to them it is. They are laughing over there. I laughed when I read their citations because they deliberately did not cite the following sentence from what they do cite. I will try not to laugh during their presentation.

What they quoted to you about what an interactive service is under the DMCA, they read through the first part, and this is in the authorities volume 1, tab 2 in section 7, the definition of an interactive service under the DMCA. It says:

"An interactive service is one that enables a member of the public to receive a transmission of a programme specially created for the recipient for on request

a transmission of a particular sound recording."

So they quote to you: well, Yahoo gives you specially created to the recipient programmes.

They do not read you the next sentence, and I quote:

"The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service by all subscribers of the service, does not make a service interactive if the programming on each channel of the service does not substantially consist of sound recordings that are performed within one hour of the request, or at a time designated by either the transmitting entity or the individual making the request."

It could not be any more clear. So Yahoo does not allow you to hear the product of the feedback you give in a manner that conflicts with the second sentence.

Their programming does say not substantially consist of sound recordings performed within an hour of the request or at a time designated. In fact the programming complies with those limitations about no more than four songs per artist in a three hour period.

So the quotation is routed out of the longer provision of interactive service. I think we would be getting off into territory we do not need to get off

into if we are going to have huge debates about what is the right definition? We think the DMCA can be adopted lock, stock and barrel, that is what everybody is basically abiding by as the dividing line between general and premium. Having said that, we are not vehemently and violently committed to having a separate rate among non-on-demand programming.

Remember, the alliance's headline rate proposal is that, putting aside special webcasting which we agree is not DMCA compliant, and we do not know who is doing that if anybody is doing that -- we are not. Put that aside, all other forms of non-on-demand webcasting are now in one bucket for headline rate purposes in the alliance's proposal.

We have proposed a dividing line for headline purposes between general and premium.

If the panel decides: let us not get into any line-drawing like that, who needs it? We are perfectly happy to split the difference and have all of it come in at the mid-point between 5 and 5.5 per cent. I noted earlier that if you just took the same proportionate reduction that occurred from the new JOL between the download rate that existed in the 2006 JOL and the new JOL of one third, you would end up with 5.33 per cent.

I leave to a later day the wisdom of drawing lines

or not. For headline rate purposes, we are not committed to the need for there to be this kind of line-drawing.

I think as we move on in the trial you may say to us: let us focus on doing it that way.

THE CHAIRMAN: You see it in a much more simple way really?

MR STEINTHAL: Yes. I think there is a much easier line to draw. It is based on an existing statute from which all these services emerged.

If we are going to draw a line, let us draw it on that basis and leave it at that. But we do not have to draw lines unless, as the alliance proposes, the minima be tiered in a very, very penal way based on whether you comply with their definition of "pure" or their definition of "premium and interactive", or their definition of "on-demand" for that matter.

I will come to the minima in a minute, because if there are no minima, as we believe there should not be, again it disappears entirely. If you look at it from that perspective, if you buy our position, which I will come to very momentarily, that it is not required or warranted that you impose minima, then you do not need to have distinctions at all. Just non-on-demand or on-demand.

We can deal with this question of special

webcasting. Frankly, we do not really care. We do not think it should be equal to fully on-demand, because it is not on-demand, but it is not what we do so as I said, it is a footnote issue.

That is the whole issue with respect to the different kinds of services.

MR WEISSELBERG: Sir, on behalf of the stenographers, I understand they would be very grateful for a five-minute break.

THE CHAIRMAN: Yes.

MR STEINTHAL: I would not mind it myself.

THE CHAIRMAN: Very well. It is now 3.50, shall we say 4 o'clock?

MR STEINTHAL: Okay.

(3.50 pm)

(A short break)

(4.00 pm)

MR STEINTHAL: I shall try to finish in the next half hour, it will be my allotted two hours. Due to the abundance, which I am happy to have, of questions from the panel I may bleed over by a few minutes but only a few.

THE CHAIRMAN: We are longing to put our fingers on a button in due course, but not this afternoon.

MR STEINTHAL: Let us turn to the issue, as I said before, the vitriolic issue of minima. Over and over again, if

you have not read their --

THE CHAIRMAN: Contentious.

MR STEINTHAL: Yes, that is another way of putting it. I think it is worse than contentious actually. Over and again, the alliance and BACs accuse the webcasters of trying to use their repertoire and pay near zero for it.

That is simply not the case. Let me start with the law on minima. Let me be brief. It is covered in our opening skeleton at paragraphs 179 to 182, which address how historically minima had been disfavoured by this Tribunal.

Citing the BPI v MCPS case, plainly the precedent is that absent a commercial justification for special treatment, minima are not warranted.

Now, prior to the settlements with the non-Webcasters, the alliance and BACs had focused their venom about the need for minima on iTunes, and the permanent download on-demand streaming models in particular.

How often did we see in the written submissions things about loss-leading of Ipod, of music to sell Ipods, or voucher systems, the effect of which was to minimise the value of music when sold as downloads?

That was their primary argument to support a per unit or per subscriber minimum for permanent downloads

and on-demand streaming subscription sales.

As the iTunes statement makes clear, iTunes does not accept that it ever underpriced but the point is the issue as it was presented for the need for minima was presented in the context of download sales and subscription sales and the concern that services operating those kinds of businesses would underprice the units being sold, the unit of music, or the unit of subscription, in order to drive some other business interest.

The new JOL solves that problem, to the extent it is a problem, with the minima that exist for permanent downloads and on-demand streaming subscriptions.

Significantly that structure, as the evidence will show, is not intended to supplant the headline rates for permanent downloads or on-demand subscriptions.

At the normal 79 pence per download price for a permanent download, the 8 per cent royalty rate yields a royalty well above the 4 pence per unit minimum.

Similarly, at the current £10 or £15 per month subscription for the on-demand streaming services of Napster or powered by MusicNet, the 8 per cent royalty would yield royalties well above the 40 pence or 60 pence minima in the new JOL for either non-portable services or portable subscription services respectively.

In short, the minima that were adopted in the new JOL by entities that were there to negotiate them for their business, permanent downloads and on-demand streaming, were designed to address explicit loss-leading concerns articulated by the alliance and they will not kick in unless there is demonstrable price-cutting relative to existing price levels for sale of permanent downloads and on-demand subscriptions.

But we have a fundamentally different proposition being presented by the alliance in respect of the new JOL's webcasting minima.

The supplementary evidence from the webcasters shows just how stifling the per-stream minima proposed by the alliance would be for advertiser-supported services.

Without getting into specific numbers, AOL's witness statement reflects that the minima would yield royalties five times higher than the headline rate.

A net effective percentage rate of 33 per cent of revenue. The Yahoo witness statement reflects that the minima, even assuming an over-broad definition of revenue for purposes of calculating what the headline rate would yield -- so if we take the alliance's argument and we plus it up to get the highest possible rate, the highest possible royalty, with the definition of revenue they want, even with that the minimums as

applied by the alliance would be 2.5 to 3 times what the headline rate would yield over that over-broad revenue base. An effective rate of almost 20 per cent.

Pandora, Mr Brown's witness statement, estimates it would work out to about 35 per cent of revenue, the minima as applied to their service based on what would be anticipated in the revenue per hour that they could drive.

The incendiary comments of the alliance and BACs essentially claim that the problem is not what they say are small per stream minima, they say the problem instead is that the webcasters are not adequately monetising their services, essentially challenging the viability of their business models.

They ridicule AOL and Yahoo in particular for the paltry, in the publishers' minds, payments that would flow from application of the headline 6.5 per cent royalty rate structure of the new JOL without the requested per stream minimum.

The alliance and the BACs's written statements make it seem, first, that minima of 0.06 pence and 0.085 pence per stream are tiny fractional amounts of no genuine cause for the Tribunal's concern. And that, as well, they take the position that the stream volumes that we are talking about, to the tune of 289 million

streams per year, in 2005, on Yahoo Radio is usage of their repertoire of, and I quote BACs at paragraph 83 of their opening submission:

"... usage of an enormous scale."

They suggest what is the harm at 0.085 pence per stream of a royalty of only £245,000, for application of a 0.085 pence per stream minimum to 289 million streams. That is in footnote 45 of their opening skeleton.

But the evidence at trial will negate both these assertions, meaning both the assertion that these 0.06 and 0.085 numbers are tiny and fractional and that this is a huge scale of usage; how will the evidence so reflect, you might ask.

289 million streams is a drop in the bucket in terms of broadcast radio simulcasting usage. It is nowhere near the kind of usage that you see under the CRCA agreement. Once you take scale into account, the hyperbole of the alliance and BACs positions comes into focus.

I ask you to look at one of Ms Enders' exhibits. I will try --

THE CHAIRMAN: Is this the one that is before us here?

MR STEINTHAL: Yes, this is appendix G to Enders 2.

THE CHAIRMAN: This is a confidential one?

MR STEINTHAL: It is a confidential document. For a short

bit, because I am going to make reference to specific numbers on it, I am going to have to ask --

THE CHAIRMAN: Can you not just say "the third figure down" or? Otherwise we are going to have --

MR STEINTHAL: I will try to do it that way.

THE CHAIRMAN: See what we can do.

MR STEINTHAL: I will pause. I wonder why aggregate data of the broadcast industry would be class 2 confidential in the first place.

THE CHAIRMAN: I was wondering that too, but never mind, that is what they say it is. But it is against my inclination to empty courts of people.

MR STEINTHAL: And mine as well.

THE CHAIRMAN: Let us see where we can go.

MR STEINTHAL: This appendix G to Enders 2 is a document referred to as "Webcasting Analysis of PRS Revenue for Commercial Radio". Let us all focus on what this is. These are figures about the PRS's licensing of commercial radio under the CRCA agreement.

You will see in the second column that is highlighted, it says:

"Hours listened: 0s per year."

So you will see that there is a number in the double digit billions of hours per year.

THE CHAIRMAN: I can see that.

MR STEINTHAL: Even if you were to use a conservative number like ten songs per hour on commercial radio, which is what this document uses, and it probably understates it, you would have hundreds of billions -- I am trying to do this -- we can all do the math, add one zero to the first line. You would have hundreds of billions of songs, of plays, because it would be the double digit billions of hours times ten, you would get to hundreds of billions of songs.

So that is hundreds of billions of plays under the CRCA agreement versus 289 million by Yahoo that BACs talked about.

So the so-called enormous scale of Yahoo is de minimis relative to the kind of streaming or broadcast activity under the CRCA agreement. So much so for that enormous scale, but let me go on. By the way, AOL's and Real's numbers in terms of volume of streaming is much less than Yahoo's.

Let us look at the far right column, it shows an effective per song royalty under the CRCA agreement. We all see that? That is 0.0 something per song. P, that is pence, not pounds.

That is clearly less than or approximately one sixth of the lowest of the minima that the alliance is proposing in this case. It is less than one eighth of

the minima that the alliance would charge to Yahoo for all of Yahoo's streams. Again this assumes a relatively small ten songs per hour for broadcast radio.

It is interesting, this per song royalty drawn from the CRCA agreement, Mr Boulton calculated a number that was somewhat less by 1400ths or so of a P compared to Ms Enders. So Ms Enders' number is somewhat larger than Boulton's number. So let us use Enders' number.

The point is this, in a mature industry, like broadcast radio, where the annual royalty and an average of 4 per cent headline rate reach the royalties -- is this a confidential number? The aggregate royalties under the CRC numbers. We have double digit millions of pounds. PRS royalty, millions of pounds.

THE CHAIRMAN: I see.

MR STEINTHAL: We have a mature industry generating double digit millions of pounds in royalties at a 4 per cent headline rate on average, which works out to a per play equivalent rate of at most the number in the right-hand column.

A number that is less than one eighth of the rate that the alliance would charge Yahoo and most other webcasting performances.

What does this tell us? This is the important bit here. The reason the 6.5 per cent headline rate yields

what appears like a small royalty to the alliance or BACs is not because the 6.5 per cent rate is too low, and not because of the lack of a per stream minimum in the range the alliance suggests, it is because the volume of activity and the audience in webcasting today is so darn small. At a volume of 300 million radio streams in a year at 15 songs per hour, which is the average of what webcasting is, you would have 20 million hours of programming. 20 million hours compared to the double digit billions of hours that is in the second column.

Now, put another way, if the audience of webcasting were to grow to the size of the audience of broadcast radio and simulcasting, the revenues would grow enormously too.

As the evidence will show, ad spend is directly related to the size of the audience you reach, and of course the volume of streams would grow as the audience increases.

So if the webcasters were fortunate enough to grow to the double digit billions of hours of streaming as reflected under the CRCA agreement then at the per song equivalent under the CRCA rate, which is one sixth the lowest of the minima proposed by the alliance, the webcaster royalties would be commensurate with broadcast

radio. They would be paying double digit millions of pounds per year.

The converse is also true. Were you to apply the lowest minimum that the alliance is proposing on a per stream minimum fee basis to broadcast radio -- get this -- their fees would go from double digit millions of pounds to a staggering -- big number. This is hard.

THE CHAIRMAN: Yes, yes.

MR STEINTHAL: Six times the number in the top line under PRS royalties.

THE CHAIRMAN: Yes, I can see.

MR STEINTHAL: So if the webcasters were saddled with this lowest per-stream minimum of 0.06 pence per play, while terrestrial radio and simulcasters are paying at the current scheme right under the CRCA agreement, and the webcasters somehow were able to grow to the same volume of plays, they would be paying the same amount of money. Versus, under the alliance's suggestion, we would be paying that huge amount of money for the same number of performances, six times as much, in the hundreds of millions of pounds. How in the world is that not discriminatory?

The CRCA agreement has no minimum at all, and the minima they are talking about would make it utterly impossible -- and this is not exaggeration -- utterly

impossible to compete with broadcast radio for the same advertisers and the same audience.

THE CHAIRMAN: Which is a mature industry.

MR STEINTHAL: Yes, it is.

If anything, the fact that we are not mature under the new format discount cases and the like would suggest we should have a lower rate. We are not asking for a lower rate. We are not asking to be discriminated against other than on a new format discount for a short period. We are not asking for a lower rate than 4 per cent even plus up to 5 per cent. Yes, we are asking for a new format discount as we are going through this transitional period.

But the bottom line is, these numbers that they are proposing would cripple the industry and there is no recognition whatsoever of that on the alliance's part.

All they do is they say: oh Lord, you would only be paying us this double digit amount of royalty under your system for 289 million streams. Well, 289 million streams, as I said, is a drop in the bucket compared to a mature radio industry.

THE CHAIRMAN: Yes, I see.

MR STEINTHAL: The simple fact is that for the alliance and BACs, to get the volume of royalties they would like from internet radio and webcasting, they would need to

have the industry grow. They do not need these minima, in fact, as the Pandora and MusicChoice statements reflect as well, these minima will stifle the very growth that is necessary to drive up the royalties to their members.

Let me turn to some of the other attacks by the alliance and BACs regarding the minima issues.

They malign us for not proposing specific minima in the red line. As noted, there are no minima in the CRCA agreement. MusicChoice notes that there is no minima in its agreement. So the webcasters do have a principled basis for saying there should not be minima here.

But we did not stop there. We had Mr Boulton opine on a legitimate minimum if the Tribunal is inclined to award one. He calculated a per stream rate based on the very CRCA data in the exhibit that you are looking at, which equated to what we all know in his report, and he suggested that the minimum -- because it is not supposed to supplant the headline rate -- should be half of what the per stream equivalent is under the CRCA agreement.

So our position, very clearly, is not what the alliance attributes to us, it is if you are inclined to have a minimum we should be paying a minimum on a per stream basis of half of what the CRCA -- and the BVC agreement he takes into consideration as well -- yield

on a per stream equipment basis.

Let me address briefly the alliance and BACs's arguments based on the PPL rates for minima.

There are several flaws; PPL of course is the collective licensing body of the sound recording owners and they have a limited mandate in the space of webcasting which they licence at a rate -- that is not confidential is it, PPL rate? -- of 0.05p per song.

First of all, let us focus on what the PPL rate is and is not. It is not a minimum fee. It is the exclusive fee basis under the PPL webcasting licence. To be sure, webcasters would object to a 30.05p rate in and of itself for the alliance, but the alliance position takes the concept of wanting your cake and eating it too to a new level.

They want the 6.5 per cent headline rate, 162 per cent of the CRCA equivalent, and they want a minimum fee that is higher than the maximum fee that the PPL gets.

That, where I come from, is chutzpah.

The alliance's position based on the PPL sound recording rate is flawed for other reasons as well. First, it is based on the presumption that in the online digital distribution market, publishers are entitled to royalties no less than the sound recording rates. That

is the premise of their position on this. We are entitled to no less than the sound recording companies get. I cite a passage from a prior tribunal case in another context that made such an assumption.

But here we have evidence in two digital online distribution markets that this assumption does not hold.

First, the facts will be that the PPL rate was based on the first ever of those US copyright royalty cases that we talked about earlier.

We talked about the fact that rates for webcasting in the US were subject to a statutory licence procedure. And in fact the PPL rate was derived from the point 0.762 cents per performance rate that came out of the CARP decision in 2002. We do not have the time to go into the bundles and get it. It is cited in our papers. With the currency at that time it was literally the translation of that rate.

Most importantly, that CARP decision shows on its face that the panel there in the online performance market rejected the very proposition upon which the alliance relies for minima here. Specifically, the CARP rejected the notion that musical work performance rates, meaning the publishing performance rates, should be no less than the sound recording performance rate for digital distribution in a webcasting.

Absolutely rejected it.

Cited in paragraph 193 of our skeleton, the panel established rates for sound recording performances that were three and a half times the musical work rates for the same performances in webcasting.

They held, and I quote:

"The panel is not required to justify why the rates, if ultimately recommended here, are greater than the rate for the use of musical works."

Paragraph 193 in our skeleton.

This as against a 0.02 cents per performance rate for musical works that was the evidence in that case, which incidentally is fairly equivalent at current exchange rates to the right-hand column of the exhibit we looked at as to what the performance rates are for radio with the PRS in this country.

Again, I am not injecting the US precedent to suggest we should follow the rates that come out of the US. I am merely pointing out that the very PPL rate that the alliance cites as evidence to support its minimum proposal was based on findings about a sound recording to musical work, rate structure flatly at odds with the premise of the alliance's position that it must get no less for webcasting than sound recording owners get for webcasting.

There is further evidence negating the alliance's presumption on that issue as well. The existing US sound recording rate is subject to ongoing trials. As you all know, that is why I am shuttling between this proceeding and a US proceeding. The very per performance rate in the UK for sound recording is subjected to a new CRB proceeding where the webcasters are trying to drive it down and the sound recording owners are trying to drive it up, surprise, surprise.

We put in the latest round of evidence. The written testimony in that case, dated September 28th, 2006, of the chief financial officer of Universal Music Group, Mr Ciongoli, he is responsible for Universal Music Group's publishing and sound recording business. So he is an employee, the CFO, of both. A rare guy. Does publishing and sound recording and he is the CFO for both. The very Universal Music Group that has affiliates -- international affiliates are members of the alliance and members of BPI.

Mr Ciongoli's evidence in no uncertain terms flatly contradicts the now withdrawn testimony of the alliance and the BACs members about the publisher's presumed entitlement to royalties of no less than what sound recording owners get.

His evidence is directed precisely at the online

webcasting market and his evidence posits that there are fundamentally different risks, investments and rewards associated with the distribution via webcasting as between the sound recording owners and the publishers, justifying a much higher webcasting royalty for labels than for the publishers.

I will not read from his testimony given the press of time. It is part of the evidence submitted with the latest round of evidence.

Finally, the alliance, its own conduct reveals acceptance that in the digital online market royalties of a fraction of the sound recording rate are reasonable for publishers. Contrary to the initially stated views in this very case, that rates for permanent downloads and on-demand streaming should be set by reference to the label deals that permanent downloads services and on-demand streaming services had entered into, now, in the new JOL, they have accepted royalty rates of one-sixth of prevailing headline rate for on-demand streaming services, and one-eighth of the prevailing rate for permanent downloads in terms of what the sound recording owners received.

In sum, the evidence shows that the premise of the minima proposal advanced by the alliance is fundamentally flawed, whether by reference to the PPL

rate or by reference to certain voluntary deals that Yahoo did with certain labels which Miss Ferguson will attest to.

I am going to blow through very quickly the remaining issues.

On gross revenue base --

THE CHAIRMAN: Do not race through it. Looking at the time now, it has gone 4.30. I do not think we are going to have time to start anyone else tonight. If you can do it in a quarter of an hour --

MR STEINTHAL: I definitely can do that.

Obviously I focused on the two main issues. I think that shows the priorities we have in terms of what we want to focus on and what we want to focus you on.

The gross revenue base, briefly, our problem is with its over-breadth and its ambiguity.

As I mentioned at the very outset, we suggest the best way to resolve the issue is for you to rule on certain concepts presented by specific examples and then have the parties incorporate your rulings on those concepts into the final version of the JOL.

THE CHAIRMAN: Could I say this, that at the end of the day, things change in these tribunal hearings. I know that from experience. I am going to ask you all to present us with a list of issues to be determined at the end of

the day because I often find in these hearings they are not the same as they were at the beginning always. In parenthesis.

But go ahead as they are now at any rate.

MR STEINTHAL: I will leave the discussion of the law, when it comes to the gross revenue issues, to my learned colleagues representing the MNOs and iTunes. Suffice to say here that an adequate nexus seems to be the right buzz words coming from the Tribunal precedent.

THE CHAIRMAN: Yes, that was in the BSkyB case, I well remember it. I lost it.

MR STEINTHAL: I think we all know that!

Suffice it to say that an adequate nexus is required as between the revenue sought to be captured in the base and the use of the alliance's repertoire.

We raise three specific issues within this ambit of dispute in our skeleton. One relates to home page and other non-music page revenues. This will come a lot more clear when we get some demos; we do not know how familiar you are with portals and how they monetise on a home page, but when you go to a home page basically you are bombarded with opportunities to move from the home page to travel to search to music to sports to news, whatever.

THE CHAIRMAN: We all have home pages on our computers.

MR STEINTHAL: Some of them are portal home pages, some of them might be a different kind of home page. But portal home pages; remember, AOL, Yahoo and Real are portals. Different kinds of portals but they are all portals. Interestingly, the alliance has largely conceded the issue of portal home page revenue for Yahoo and AOL. It conceded that as currently constituted there is no sufficient nexus between the home page revenues of Yahoo and AOL and the revenue base for the new JOL.

We need, however, to more broadly clarify this principle and its application for companies other than AOL and Yahoo and that remains to be determined on the issue of home page revenue.

THE CHAIRMAN: On the basis that different home pages could --

MR STEINTHAL: I think we need to have more of a principle of general application. RealNetworks, for example, is a portal. The settlement agreements as they have been articulated or written are specific as to AOL and Yahoo, they are not specific as to RealNetworks. If we have a dispute with them about Real we will have to put evidence in on it. If it turns out that they are not going to press that the RealNetworks home page should come into the revenue bucket then we can shorten the evidence on that issue.

The other aspect of this part of the revenue definition relates to pages within a music service that are served up that do not serve music. So, for example, you can be on a text page, entirely text, not listening to music, checking out information about your favourite artist, when that artist is coming to town, and if there are ads served on those pages, should the ad impressions generated on those pages come into the revenue base? Even when you are not being delivered music that comes within the ambit of what they are licensing. Our position is no, their position is yes. There will be some evidence on that and you will make a decision.

THE CHAIRMAN: Are you envisaging a snippet, for advertising purposes, of a movie or something?

MR STEINTHAL: No. What we are saying is that on those pages where there is no activity occurring, comprised of the exploitation of the alliance's repertoire, the revenue should not come in.

I think what we have here are some issues that are black and white and some issues that are not. I think the home page revenue issue is black and white and that is why the alliance has conceded it.

THE CHAIRMAN: Alright, we will put that down on the menu for having a look at.

MR STEINTHAL: I think this issue of whether within the

music area of a portal, if you have non-music pages, whether the revenue should come in, I would concede that is a tougher issue. It is a closer call. But we do not believe it should come in, they believe it should. We will address it at trial.

Our biggest concern is the overarching language of the general revenue definition. The mere fact, for example, that you can go from one page of a portal to another and at that second page listen to music does not mean that at the prior page, if there is money being generated, when you are not listening to music it should come in.

That is our view.

The second category of revenue definition that is of concern to the webcasters is product sales.

THE CHAIRMAN: Where are these definitions to be found, incidentally?

MR STEINTHAL: We address the issue in section 2 that starts on page 36. We talk there about the legal standard first, on page 36. On pages 37, 40 and 41 we address the three issues under royalty base that we are putting forward to the Tribunal as examples of the problems with the gross revenue definitions.

Schedule 3 of the new JOL is what creates the gross revenue definition that we challenge and that apparently

every applicant challenges in some fashion.

So the product sale issue, I am glad to say, is not as big an issue as the alliance says it is.

The alliance says that we object to click-through revenues coming into the base. We do not. If the basis for an ad is instead of somebody saying: I am going to pay you X thousand pounds for Y number of impressions on your site, on the pages of your site. Instead it is: I am going to pay you for every click on that ad, I am going to pay you Y number of pounds. And so the manner in which the advertiser gets paid, the monetisation, is on a per click basis instead of on a lump sum basis for a number of impressions, we are totally comfortable that click-through in the music area of the website it comes in.

THE CHAIRMAN: Your case is different to somebody else's case?

MR STEINTHAL: I think we are all in agreement that if it is part of the exploitation of music and there is a click-through, that comes in.

MR RABINOWITZ: Mr Steinthal is right, the other parties have always accepted click-through. We had understood that Mr Steinthal's clients had not. If they do then there is no issue as to that.

THE CHAIRMAN: Excellent. What a happy exclusion.

MR STEINTHAL: The issue relates to commission income.
THE CHAIRMAN: Yes, that is all coming back.
MR STEINTHAL: That is the issue that we object to with product sales. It is very simple; if the money associated with buying a product does not come into the revenue base if we sell it directly, why in the world should it come into the revenue base if we are paid a commission when somebody else sells the same product?

It is that simple. We just do not believe that there is the sufficient nexus between getting paid a commission if we push traffic to somebody else's website where something is going to be bought, if it was purchased directly at our website, they concede it would not come into the revenue base, they conceded that in the negotiations with the MNOs and iTunes, but they want the commission, if that same product is sold elsewhere. We think there is no sufficient nexus either way and our evidence will address that and we will talk about offline examples where similarly --

THE CHAIRMAN: Let us see where we go on that one.
MR STEINTHAL: Perhaps the most interesting area of evidence on gross revenue associated with our services is the bundling area. This is where, for example, BT sells for 15 to 20 to 25 pounds, depending on what you buy, connectivity, high speed broadband access. And as part

of the money you pay, embedded within the service is a Yahoo media package. Not just music, enhanced e-mail and lots of other features, and within that is embedded Yahoo's webcasting service also available.

THE CHAIRMAN: How can you disembundle it?

MR STEINTHAL: Exactly. You can do it in two ways. If each element of the bundle had a legitimate standalone price, so for example if you had just two things in the bundle and each of them was a viable product in the market and there was a webcasting service that people were paying £4 for per month, and there was a games service that you were paying £8 a month for, and you packaged them together for £10, you could say in that situation that since both products have a standalone value, when they are purchased separately they have a ratio of 1:2, you could take the £10 and allocate what is paid on a 1:2 basis. That is what Mr Boulton says, that is what the alliance says.

We are all in agreement; where everything has a standalone legitimate market value that is the way to do it. The problem is we do not see very much in the market like that. What we see are these total bundles where there is no standalone price for virtually all the elements of the bundle.

In that situation, Mr Boulton has looked at it and

his testimony is there is just no good way to do it, there is no sound way to unbundle, and so we propose that there be an alternative usage fee based precisely on the CRCA per stream rates that we looked at before. We looked at the CRCA and the BVC rates and Boulton addresses that, and we would be paying X pence per song, the equivalent of what the CRCA rate works out to be, for bundle uses of music.

One specific thing I want to address on this is that the suggestion has been made in the new JOL that the alliance would be permitted to ascribe values based on their discretion, their views, of what similar products in the market would command.

Now, this is fraught with peril. The real thing that the alliance wants to do is say that if Yahoo's music package looks like the RealNetworks subscription music package and people are willing to pay hypothetically £5 a month for that other non-on-demand webcasting service. The alliance might say: we will just take that standalone value and ascribe it to webcasting within the bundle. That does not work for the following reasons: first and foremost, if someone is paying for an a la carte subscription service they have made a unilateral individual decision, they want the product, and they want to use it and they are willing to

pay X pounds per month.

When you then move into the bundle like the BT Yahoo bundle, (1) the product is different, and (2) even if it was the same product, if 90 per cent of the people that buy the bundle -- and that is what the data suggests -- never use the music service because the driving force of the BT Yahoo bundle is connectivity, how can you say that the value on a standalone basis within that bundle is what the individual that wants to use it is willing to pay when 90 per cent of the people buying the bundle do not use that product?

Mr Boulton is very clear on this: when you do not have standalone prices legitimately for each of the items in the bundle, you cannot unbundle, you default to an usage metric. Again we are not trying to pay nothing. We are not trying to pay less than market value. We are willing to pay on a per stream basis the identical amount that is yield from the CRCA agreement.

That is the nub of the unbundling issue.

THE CHAIRMAN: Well, we will see what is said about that.

MR STEINTHAL: Other issues, rapid fire. There is the advertising commission issue. This is one of those two issues where there is no dispute that a reduction is required, the question is how much.

Basically the new JOL provides that to the extent

there is advertising, there is a five per cent reduction. Of course, as we have said before, none of the entities that negotiated that deal presently have any advertising associated with their websites, and their concerns are more down the road and conceptually about certain issues that are addressed in their particular submissions.

But the comparable we have urged, for us the different business of webcasting is broadcasting, and it is quite clear that the broadcasting benchmark has a 15 per cent reduction for the cost of selling ads.

The mere fact that AOL and Yahoo have their own staffs and their own costs associated with ad sales instead of out of pocket commissions does not mean that they do not have such costs. They do. The evidence will reflect what those costs are, and the 15 per cent precedent coming from the CRCA agreement is the right one to adopt. Simple enough.

As far as the audiovisual reduction is concerned, let me state it this way. Again it is no dispute that it is warranted. Audiovisual works have something that audio only -- meaning radio-like works -- do not. They have video. That is why, for example, when you purchase a DVD of music, meaning a music video in which the sound recording is embodied, you pay a lot more. You pay

almost two times what you would pay for the audio-only CD. Why? Because the video component enhances the value.

In the prior precedent from the DVD1 negotiations between the BPI and the MCPS this was recognised, and so the DVD rate is 25 per cent lower than the CD rate for the same piece of music.

Again, it is a recognition that when you are buying an audiovisual product part of the value is a video. Therefore the royalty should attach only to the audio-only music component and, hence, 75 per cent of that.

THE CHAIRMAN: 75 per cent goes to the --

MR STEINTHAL: 75 per cent of the full value goes to them, and another is a 25 per cent reduction in royalty as a consequence.

THE CHAIRMAN: Yes.

MR STEINTHAL: The other issue here on the audiovisual issue is the alliance's position is that the royalty reduction for audiovisual usage should only apply to headline rate and not to minima. Especially in this situation, where they are seeking minima that would supplant the headline rate as all the evidence shows, it is just not principled and not appropriate to not apply this 25 per cent reduction to the royalty however it gets

calculated.

Let us remember the reason there is this reduction at all is because part of the value being delivered is video, and therefore you have to take that into consideration, the royalty.

You should not pay the same for the royalty for an audio-only work as you would an audiovisual work. It should apply equally whether the royalty is generated by a minimum fee or by a headline rate fee, and we believe it should be 25 per cent based on the precedents. They believe it should be 15 per cent based on the new JOL.

I would point out that none of the entities that settled, just like my arguments earlier, have any meaningful video streaming business. The video streaming in the UK is done by AOL, Yahoo and Real. There is not a meaningful amount of video streaming on any of the companies that settled.

THE CHAIRMAN: We are going to have evidence on that?

MR STEINTHAL: Yes.

There are two more issues that I think are basically taken off the table.

There is the issue of non-alliance repertoire. Paragraph 5.9 of the new scheme affords a specific carve-out, if you will, or credit or reduction when on-demand streaming services or permanent download

services pay, based on a hundred per cent alliance repertoire, and it turns out that they paid for a repertoire which is not licensed within the repertoire. They get a credit or their money back.

We have asked for the same thing. They say paragraph 5.10 is the rough equivalent. We do not think we should be the ugly stepchildren here, we should get the same benefit that the on-demand streaming and permanent download services are getting when it comes to a carve-out or reduction associated with our paying for product that it turns out is not within the alliance's repertoire.

I read their skeletons as conceptually agreeing with us but they are bickering with us a little bit about whether 5.10 really covers the same thing as 5.9.

THE CHAIRMAN: I hope you will be able to resolve that.

MR STEINTHAL: Yes. Similarly the proper licensee issue.

MusicNet has done an arrangement, part of the documents in your binders. I mentioned before, MusicNet is a white label service, so that you go to HMV, you go to Virgin. It is really MusicNet that is in charge of getting the licences from the labels, paying and reporting to the alliance. They did an arrangement with the alliance whereby the alliance agreed that as long as you adhere to certain conditions, including a direct

right of audit and all sorts of things to make sure that information flow goes to the alliance, and the alliance has audit rights not only against us but against any third party distributors, that it is okay for MusicNet to be a licensee.

We want the same benefit for companies like Yahoo when they distribute their service through BT. BT is the one that "owns" the relationship with the customer but Yahoo is the one that provides the music service.

I read their skeletons as basically saying: we do not really have a problem with Yahoo as long as they adhere to the same limitations as MusicNet, and we think at the end of the day this is for a JOL, for application to everyone; it should provide that as long as anyone wants to do this in the fashion that adheres to the conditions that were required of MusicNet, it ought to be available as an option for distribution online on that basis.

Finally, new format discount. Webcasting is in its infancy. Prior precedence suggests it is appropriate.

THE CHAIRMAN: Well, they recognise the existence of it at any rate. Would it not be better to see what they say?

MR STEINTHAL: Yes. I know what they are going to say.

THE CHAIRMAN: You have got your toe in the door there.

MR STEINTHAL: A new format, I do not think so.

THE CHAIRMAN: No?
MR STEINTHAL: No. I do not think they believe they have opened the door one fraction of an inch.
THE CHAIRMAN: All right.
MR STEINTHAL: I hate to speak for the alliance but on that one I feel confident.
THE CHAIRMAN: You are going to give the door a boot.
MR STEINTHAL: Housekeeping. The new JOL is an attachment to each of the settlement agreements that we referred to earlier.

H1/1, H1/6 and H1/8 have the new JOL for each of the settlement parties. I just thank the Tribunal for allowing me to both participate generally and go a little bit over today.

THE CHAIRMAN: Thank you very much indeed. Could I just raise one or two points. First of all, may we give you back this confidential document.
MR STEINTHAL: You may. Unless you wanted to take it home and study it.
THE CHAIRMAN: Well, keep it because we may want to use it again.

The proposed trial timetable, would you like to have a look at that? We were a little surprised to see that 27th and 28th had been blacked out. Why is that?
MR STEINTHAL: That was the accommodation for when I had to

be back in the States for sure during that week, and we felt that we would still be able to finish by the self-imposed and Tribunal-imposed requirement that we finish the week of the 4th December. It may be, I have to consult with the schedule over there, that one of those days comes back in which event I would be happy to let everybody know if people want to sit on one of those days.

THE CHAIRMAN: For example, on the 4th, I can tell you now I have a one-day case on the 4th so that there will not be any demonstration.

MR CARINE: I cannot possibly do it.

THE CHAIRMAN: The Rear Admiral cannot do it either. I am not coming on my own.

MR CARINE: The 1st and the 4th are absolute no-no days for me.

MR STEINTHAL: What I am advised is a good idea is, to the extent we do not cover the demos adequately during witness testimony, on 27th or 28th we could certainly do demos.

THE CHAIRMAN: Yes, if you could put that down.

While you were telling me about the interaction or interrelation of the audio and visual components of an audiovisual production, you might like to take a look at a case in which that was in issue before the Singapore

Copyright Tribunal called Singapore Broadcasting Corporation v Compass, which is the Singapore equivalent of the Performing Rights Society. It was about ten years ago and is reported in the Fleet Street Reports.

MR STEINTHAL: My recollection is we take that rate. I think it was a one per cent rate or something like that.

THE CHAIRMAN: That is right, it was. I just mention it without giving away who was winning or who was losing on that one.

MR STEINTHAL: I actually had the privilege of dealing with the Singapore Copyright Tribunal once, part of my international travels.

THE CHAIRMAN: In the morning we are down for 10 o'clock.

MR CARR: Can could I raise a point on that. It is nothing to do with Mr Steinthal's presentation at all, but if you look at the programme for today, it did contemplate half an hour of me. Now, obviously, inevitably one has to take a ten minute break and we did not start actually until 2.15 so inevitably it overran a bit.

THE CHAIRMAN: You are feeling compressed?

MR CARR: Not at the moment, but if someone else is required at 11 o'clock I might do. There are a number of ways round this, because I do have -- I do not know how the Tribunal feel, but I feel that for each party to do these openings is very, very important. Otherwise one

has a whole lot of evidence and nobody quite knows where it is going. It is more important than a lot of the evidence. So I was going to suggest either you start at 9.30, I do not know whether it is possible, or if we had a slightly shorter lunch or something we could fit everything in.

THE CHAIRMAN: We will start at 9.30 then, is that all right? Mr Aldous does not look too happy about that.

MR ALDOUS: I am quite content.

THE CHAIRMAN: So 9.30 tomorrow. Thank you very much.

(5.00 pm)

(The court adjourned until 9.30am on Thursday, 16th November, 2001)